Supreme Court, U.S.
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No. 95-1354

IN THE
SUPREME COURT OF THE UNITED STATES

June Term, 1996

HERBERT LIU,

Petitioner,

- against -

NEW YORK CITY POLICE DEPARTMENT, LEONARD KAPLAN and ROBERT PLUTZKER,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

BRIEF IN OPPOSITION

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COUNTER-QUESTION PRESENTED

Whether, in the absence of any concrete evidence that municipal officials violated petitioner's civil rights by revoking his pistol license based on his ethnicity, and where the Appellate Division, First Department, of the New York Supreme Court, found that the evidence demonstrates a reasonable and lawful basis for those officials to revoke the license, the Appellate Division contradicted any prior decisions of this Court by dismissing the complaint based on the defense of qualified immunity?

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PETITIONER CITES NO EVIDENCE IN SUPPORT OF HIS CONCLUSORY ASSERTION THAT THE INDIVIDUAL RESPONDENTS REVOKED HIS LICENSE BECAUSE OF DISCRIMINATORY INTENT. BY CONTRAST, THE APPELLATE DIVISION OF THE NEW YORK SUPREME COURT FOUND THAT RESPONDENTS' CONDUCT WAS REASONABLE UNDER THE

LAW. IT FOLLOWS THAT, REGARDLESS OF INTENT, RESPONDENTS HAD REASON TO BELIEVE THAT THEY WERE ACTING LAWFULLY. THE COURT WAS THEREFORE CORRECT IN DISMISSING THE COMPLAINT BASED ON THE DOCTRINE OF QUALIFIED IMMUNITY. 14

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STATEMENT OF THE CASE

A. Factual background.

On January 1, 1989, the License Division of the New York City Police Department ("NYPD") issued petitioner a carry pistol license, designated No. 327780 (the "carry

license") and a target pistol license, designated No. T009918 (the "target license") (25)[1].

Under the carry license, petitioner was authorized to possess a Colt .38 caliber handgun, Serial No. M717753, and a Bauer .25 caliber handgun, Serial No. 973352S (25). This license stated plaintiff's address as 221 Canal Street, Suite 614, New York, New York 10013. For its part, the target license authorized petitioner to possess a Colt .45 caliber handgun, Serial No. CLW031933 (25). On this license, petitioner's address was 10 Confucius Plaza, New York, New York 10002 (25).

On November 25, 1990, allegedly acting in response to threats on his life, petitioner met with detectives from the New Jersey State Police at the Sands Casino and Hotel in Atlantic City, New Jersey, where petitioner had traveled in order to promote an entertainment event (25). During their conversation petitioner told the detectives that he had brought to Atlantic City a gun that he possessed under a New York City carry pistol license (25). Petitioner stated that he had stored the gun in a safety deposit box in the hotel but kept the bullets in his hotel room (25).

At the request of the detectives, petitioner produced his NYPD carry license, as well as a photocopy of a "Voluntary Form to Register a Firearm in New Jersey" ("New Jersey form"), dated May 14, 1987 (25-26). Although the carry license listed petitioner's address as 221 Canal Street, Suite 614, in New York City, the New Jersey form gave his address

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[1] Numbers in parentheses refer to pages of the Record on Appeal submitted to the Appellate Division, First Department, of the New York Supreme Court.

as 454 Villas at Eagle Ridge, Unit 62, West Orange, New Jersey 07052 (26). Petitioner also possessed a New Jersey driver's license bearing the same New Jersey address (26).

The New Jersey form was an application to register petitioner's firearm but did not constitute a license to carry that weapon, for which petitioner could produce no valid New Jersey permit (26). Accordingly, the detectives concluded that petitioner had no legal authority to carry the weapon in New Jersey (26). Upon conducting a consensual search of petitioner's safety deposit box and hotel room, the New Jersey State Police confiscated his Colt handgun, six Winchester .38 caliber special P hollow point bullets, and a black, belt-type gun holster (26). A further investigation by the Firearms Unit of the New Jersey State Police in Trenton, New Jersey, confirmed that plaintiff did not possess the appropriate New Jersey authorizations to carry a firearm (26).

The NYPD's License Division began conducting its own investigation into the Atlantic City incident and requested discovery material from New Jersey's Division of Criminal Justice (26). Pending the results of its investigation, the License Division, as a standard precautionary measure, took possession of petitioner's remaining weapons (27).

On March 7, 1991, the License Division received the discovery material it had requested from New Jersey, consisting of various reports and documents pertaining to the Atlantic City incident (27). These documents indicated that petitioner had been indicted in the Superior Court of New Jersey, Atlantic County, for the unlawful possession of the six hollow nose bullets (27).[2] Accordingly, after reviewing the

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[2] Petitioner was subsequently acquitted of these charges.

material and finding a sufficient basis to suspend the licenses, the License Division mailed petitioner a letter suspending his two pistol licenses (27). As grounds for the suspension, the letter cited petitioner's failure to safeguard his firearm and his transporting that firearm to a jurisdiction where he was not licensed to carry it (27).

In the meantime, on January 30, 1991, petitioner had served the NYPD with a notice of petition pursuant to Article 78 of the New York Civil Practice Law and Rules ("CPLR") seeking the return of the handguns he had surrendered to the License Division (27). This proceeding, *Liu v. NYPD,* Index No. 02315/91 (Sup. Ct., NY Co.), (*"Liu I"*) was assigned to Justice Stephen G. Crane (65).

In response to the Article 78 petition, the NYPD cross-moved to dismiss the petition pursuant to CPLR §§ 7804(f) and 3211(7) for failure to state a cause of action, arguing that petitioner had failed to exhaust his administrative remedies. By order dated March 25, 1991, Justice Crane granted the cross-motion and dismissed the petition (28). Justice Crane directed the License Division, however, "to afford a hearing to petitioner within 10 days of service upon it of a copy of this judgment with notice of entry and thereafter to proceed to a prompt determination of the status of petitioner's licenses" (28).

B. The administrative hearing.

Although the NYPD's standard procedure is to wait until it receives a final disposition on pending criminal charges before conducting a full administrative review of a pistol

license suspension, the effect of Judge Crane's order was to require that the hearing be held before the criminal charges were resolved (28). Consequently, the License Division scheduled an expedited hearing for April 5, 1991 (28). Hearing Officer Robert Plutzker, a respondent herein, presided (28).

At the hearing, Detective Robert Schulte of the New Jersey State Police testified about the November 25, 1990, incident in Atlantic City (28). The only documents petitioner was able to produce at the time, Detective Schulte testified, were the NYPD carry license bearing the address 221 Canal Street, Suite 614 in New York City and the New Jersey form listing petitioner's address as 454 Villas at Eagle Ridge, Unit 62, West Orange, New Jersey (28). The New Jersey form was merely an application to register a firearm in New Jersey and did not constitute a license (28). The detective stated that after searching petitioner's safety deposit box and hotel room at the Sands Hotel, he confiscated a Colt .38 caliber revolver, six Winchester .38 round hollow point bullets, and a black, belt-type gun holster (28). According to Detective Schulte, his investigation revealed that petitioner did not possess the appropriate New Jersey authorization to carry a firearm (28).

Petitioner then testified, maintaining that he keeps two residences, one in New York at 10 Confucius Plaza, Apartment 15J, and one in New Jersey at 454 Villas at Eagle Ridge, Unit 62, in West Orange (29). He stated that he had tried to license two of his weapons and one of his wife's weapons in New Jersey by sending various forms by certified mail to the West Orange Township Police Department and the New Jersey State Police Department in Trenton (29). He testified that he had never received any response from the New Jersey State Police Department regarding any of these forms (29). Petitioner

acknowledged that he was not licensed to possess a gun in New Jersey but that nonetheless his regular practice had been to bring a gun to that state and leave it at his New Jersey residence before traveling to Atlantic City (29). He maintained that on November 25 he did not have time to drop the gun off at home before his Atlantic City visit (29).

By written decision dated April 11, 1991, Hearing Officer Plutzker revoked both of plaintiff's pistol licenses (29). After summarizing the testimony of Detective Schulte and petitioner, the decision concluded that petitioner's testimony and the evidence he presented were "not credible or persuasive" (29). The Hearing Officer noted that he had rendered an expedited decision as a result of Judge Crane's order and that, at the date of the hearing, no final disposition had been reached regarding petitioner's criminal indictment in New Jersey (29). He stated (29-30):

> [Petitioner's] alleged attempts to register the gun in N[ew] J[ersey] are minimal. He never attempted to receive a NJ gun license and only attempted to register the guns in NJ . . . . [Petitioner] has the burden and the duty to fully inquire as to the proper procedure when dealing with the privilege of having a gun. He failed to do so.
>
> . . . .
>
> [Petitioner's] alleged attempt to inquire as to NJ gun law was inadequate. The circumstances of his arrest for unlawful possession of a Prohibited Device - (the hollow nose bullets) and his admitted illegal possession of a weapon in NJ on 11/25/90 clearly show that he has failed to safeguard his weapon and transported his weapon without authorization or under the law of the jurisdiction.

> The circumstances of this incident cast grave doubt upon his character and fitness to possess a pistol license. [Petitioner's] pistol licenses are revoked . . . .

Petitioner appealed Hearing Officer Plutzker's determination to Leonard Kaplan, a respondent herein, who was then Commanding Officer of the License Division (30). On May 7, 1991, Officer Kaplan sustained the suspension based upon 1) petitioner's failure to notify the License Division of a change of residential address; 2) the seizure in Atlantic City of a handgun in petitioner's possession but not licensed in the State of New Jersey; and 3) petitioner's criminal indictment in New Jersey for the unlawful possession of a prohibited device (30).

C. The Article 78 proceeding (*"Liu I"*).

By Notice of Petition dated May 21, 1991, petitioner recommenced his proceeding, pursuant to Article 78 of the CPLR before Justice Crane seeking a judgment "reviewing, annulling and rescinding" NYPD's suspension and "compelling [NYPD] to reinstate Petitioner's licenses and further compelling [NYPD] to return to petition [sic] his licensed firearms which it previously confiscated from Petitioner" (52-61).

By judgment and order dated October 24, 1001, Justice Crane denied the relief requested and affirmed NYPD's determination, finding that (68):

> it was not irrational for [the NYPD] to reject on credibility grounds petitioner's claim that he had used due diligence in becoming licensed in New Jersey and had a good faith belief that he was in fact licensed there. Consequently, it

was appropriate to hold him to the strict letter of the law and conclude that, having transported his firearms into New Jersey, he violated the terms of his New York licenses. Revocation was a proper exercise of [NYPD's] discretion.[3]

Upon appeal by petitioner, the Appellate Division, First Department, of the New York Supreme Court affirmed Justice Crane's decision (70). *Liu v. New York City Police Department*, 188 AD2d 284, 591 NYS2d 5 (1st Dept. 1992), *motion for leave to appeal denied,* 81 NY2d 708 (1993).

D. The instant action.

Less than two months after the Court of Appeals denied petitioner leave to appeal, he commenced the action underlying the instant petition in New York Supreme Court, New York County (Solomon, J.), alleging that his permit revocations were "unlawful and in bad faith in that [they were] discriminatory based entirely upon his Chinese national origin and upon an arrest for which he was acquitted and was motivated by no proper public purpose" (44-45). He further alleges a conspiracy to deny him his "rights under Constitution and Statute," although he does not identify which statute and whether he is invoking the state or the federal constitution

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[3] By order dated January 30, 1992, Justice Crane also denied reargument of his judgment of October 24, 1991 (70).

(45).[4] Petitioner seeks to vindicate purported violations of his rights to due process and to equal protection (45). As relief, petitioner seeks 1) compensatory damages of $1 million; 2) punitive damages of $1 million; 3) immediate restoration of his pistol licenses; and 3) attorney's fees (47).

By notice of motion dated July 28, 1993, respondents moved to dismiss the complaint on the grounds, *inter alia,* of *res judicata* and collateral estoppel as well as of qualified immunity (21, 34).

By an order and decision dated March 15, 1994, the New York Supreme Court denied respondent's motion for dismissal (8-16). The court below held that issue preclusion is not applicable in this instance because (12):

> There was no reference in [petitioner's] Article 78 proceeding to alleged statutory and/or constitutional violations or that defendant's actions were in any way related to [petitioner's] national origin. These issues are the crux of the within plenary action.

With regard to *res judicata*, the court opined that since petitioner would not have been able to obtain damages for constitutional violations in an Article 78 proceeding, his claims are exempted from the "factual grouping" within which they would otherwise be precluded by the transactional approach to *res judicata* (13).

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[4] Because petitioner seeks, *inter alia,* attorney's fees, which are not available for state law claims, we assume he is asserting his claims pursuant to 42 USC §§ 1983 and 1988.

In addition, the court rejected appellant's contention that petitioner's constitutional claims are precluded by the defense of qualified immunity, stating (14-15):

> A reasonable person, utilizing an objective standard, would be expected to realize that one cannot discriminate in the fashion (nationality) alleged in the complaint.

E. The decision at issue.

By order entered June 13, 1995, the Appellate Division, Second Department, of the New York Supreme Court reversed the decision of the lower court and dismissed the complaint. *Liu v. N.Y.C. Police Department,* ___ AD2d ___, 627 NYS2d 683 (1st Dept. 1995).

Although the Appellate Division did not agree with respondent's argument that *res judicata* and collateral estoppel were proper grounds for dismissal, it held that the individual respondents should be granted qualified immunity from petitioner's civil rights claims. The Appellate Division explained its determination as follows:

> There can be no question in the instant case that the revocation of pistol permits on the impermissible basis of national origin would be a violation of a right clearly established with sufficient specificity such that a reasonable government official would have known that engaging in such conduct was unlawful. However, we find that a reasonable official could have believed that the conduct at issue here was lawful.

> A firearm licensing authority has broad discretion in rendering its determinations [citations omitted], and under the circumstances here where plaintiff engaged in conduct illegal on its face with regard to firearms, was arrested, and offered an explanation for his conduct which could reasonably be viewed as lacking credibility, defendants had no reason to believe that their conduct was unlawful in revoking plaintiff's permits; indeed we found it rationally based [*Liu I*]. Absent a discriminatory motive, defendants challenged conduct would not violate clearly established law. However, plaintiff's pleadings with regard to discriminatory intent are vague and conclusory, and even in opposition to the motion to dismiss plaintiff fails to demonstrate any nexus between the specific evidence purportedly supporting the complaint and the acts of the defendants [citation omitted].

RELEVANT PROVISIONS OF LAW

Section 10-131 of the Administrative Code of the City of New York ("Administrative Code") authorizes the NYPD Commissioner to grant licenses for the keeping or carrying of pistols within the City of New York. The sections states in pertinent part:

> Firearms. a. Pistols or revolvers, keeping or carrying.
> 1. The police commissioner shall grant and issue licenses hereunder pursuant to the provisions of article four hundred of the penal law. . . .

Section 400.00 of the New York Penal Law sets forth the four requirements an applicant must meet in order to possess a license or carry a pistol, and provides in pertinent part:

> 1. Eligibility. No license shall be issued or renewed pursuant to this section except by the licensing officer, and then only after investigation and finding that all statements in a proper application for a license are true. No license shall be issued or renewed except for an applicant (a) of good moral character; (b) who has not been convicted anywhere of a felony or a serious offense; (c) who has stated whether he has ever suffered mental illness or been confined to any hospital or institution, public or private, for mental illness; and (d) concerning whom no good cause exists for the denial of the license. . . .

The NYPD's published guidelines, codified as part of the Rules of the City of New York ("RCNY"), provide the types of pistol licenses which can be issued for use at a pistol range or for hunting. This pistol must be kept unloaded and in a locked box when not being used for target shooting. A carry license is issued to people who are self-employed or employed in a position that requires the person to be armed. The NYPD is to conduct a thorough investigation before determining whether an applicant is qualified to receive a license. 38 RCNY §§ 5-01, 5-02, 5-03.

38 RCNY § 5-29(a)(1)(i) requires a licensee to inform the NYPD's License Division of any change of residential address, and states as follows:

> If the licensee has moved, he must change the address listed on his license. To do so the licensee must come to

> the License Division no later than ten (10) days after the change becomes effective.

Moreover, a licensee who relocates outside of New York must cancel his or her license. 38 RCNY § 5-29(a)(1)(iii).

A licensee must also notify the License Division immediately when he or she "becomes involved in a situation which comes to the attention of any police department, or other Law Enforcement Agency. . . ." 38 RCNY § 5-30(d). 38 RCNY § 5-30(e) provides that:

> All [such] "Incidents" will be reviewed and evaluated by License Division investigators. If, as a result of the "Incident" the License Division finds it necessary to suspend or revoke the license, the licensee will receive notification by mail.

Failure to comply with the notification requirements and other provisions relating to handgun licenses is a violation of the New York Penal Law. 38 RCNY § 5-30(g). Section 400.00(11) of the New York Penal Law authorizes the License Division to revoke a pistol license "at any time."

REASONS FOR DENYING THE WRIT

PETITIONER CITES NO EVIDENCE IN SUPPORT OF HIS CONCLUSORY ASSERTION THAT THE INDIVIDUAL RESPONDENTS REVOKED HIS LICENSE BECAUSE OF DISCRIMINATORY INTENT. BY CONTRAST, THE APPELLATE DIVISION OF THE NEW YORK SUPREME COURT FOUND THAT RESPONDENTS' CONDUCT WAS REASONABLE UNDER THE LAW. IT FOLLOWS THAT, REGARDLESS OF INTENT, RESPONDENTS HAD REASON TO BELIEVE THAT THEY WERE ACTING LAWFULLY. THE COURT WAS THEREFORE CORRECT IN DISMISSING THE COMPLAINT BASED ON THE DOCTRINE OF QUALIFIED IMMUNITY.

Petitioner has demonstrated neither that the Appellate Division misapplied the doctrine of qualified immunity nor that its decision conflicts with any applicable decision of this Court.

Government officials performing discretionary functions are immunized from suit "insofar as their conduct does not violate clearly established statutory principles of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 US 800, 818 (1982). In order to determine whether law is "clearly established," "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates the right." *Anderson v. Creighton,* 483 US 635, 639 (1987).

After *Anderson,* a court must consider three factors in determining whether a particular right was clearly established:

1) whether the right in question was defined with reasonable specificity; 2) whether the decisional law of the Supreme Court and the applicable circuit court support the existence of the right in question; and 3) whether under pre-existing law a reasonable defendant official would have understood that his or her acts were unlawful. *Jermosen v. Smith*, 945 F2d 547 (2d Cir. 1991), *cert. denied,* 503 US 962, 112 S. Ct. 1565 (1992). But, as the United States Supreme Court and the Second Circuit Court of Appeals have held, before a court addresses these issues, it must determine, as a threshold matter, whether a cause of action has been stated, because "[c]onduct that does not violate any constitutional right certainly does not violate a constitutional right that was 'clearly established' at the time the conduct occurred." *Mazzochi v. Borden,* 959 F2d 1174, 1179 (2d Cir. 1992); *accord Siegert v. Gilley*, 500 US 226, 111 S. Ct. 1789, 1793 (1991) ("A necessary concomitant to the determination of whether the constitutional right . . . is 'clearly established' . . . is the determination of whether the plaintiff has asserted a violation of a constitutional right at all.").

In *Liu I*, the Appellate Division, First Department, of the New York Supreme Court determined that it was reasonable for the defendants to have revoked petitioner's pistol permits. In this case, petitioner alleges no additional facts other than an unsubstantiated assertion that petitioners were motivated by an intent to discriminate against him based on his ethnicity. It was therefore logical that the Appellate Division should, in this case, reaffirm its finding that the conduct of the individual respondents was reasonable under the law. A corollary of this finding is that, regardless of motive, the individual respondents had good reason to believe that their conduct had a lawful basis. Where public official have reasonable grounds to believe their acts were justified under the law, there need be no examination of motive. *See Mazzochi v. Borden*, 959 F2d at

1179 (where retaliatory prosecution is alleged, reasonable grounds for the defendants to believe probable cause exists justifies an application of qualified immunity without an examination of motive); *Magnotti v. Kuntz,* 918 F2d 364, 368 (2d Cir. 1990).

Petitioner has therefore failed to meet the threshold test of alleging conduct that would amount to a constitutional violation. His allegation of discriminatory intent is no more than conclusory and does not in itself constitute evidence that respondents could not have believed that their conduct was lawful.

Since the individual respondents had adequate reason to believe that their conduct was lawful, they are protected by the doctrine of qualified immunity. The Appellate Division was correct in dismissing the complaint on that basis.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED, WITH COSTS.

Respectfully submitted,

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